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To the Editors of the Harvard Law Review: —

THE HARVARD LAW REVIEW has had a kind word for the Selden Society on several occasions, and it may be willing to give a little space for some remarks concerning the Society's volume now in the press; for the present undertaking is unique.

The volume in hand deals with matter out of the regular course of the proceedings of the courts. The accomplished editor, Mr. Maitland, has turned aside from pleas in the royal courts, and gone a-field into the manors; and why? will be the natural question. The answer is, that the rolls of the manor courts throw a very special light upon much that took place in the royal courts; and not a side-light merely, valuable as that generally is; the light from the manors often begins where that of the higher courts has gone out.

I speak briefly here of matters of procedure only; though these rolls are equally instructive in regard to substantive law *ex directo*.

The procedure of the manor courts, while following the same general lines as those of the royal courts, yet ran a course of its own. It would not be necessary to remind lawyers that procedure has had much to do with important branches of the substantive law; but it is worth while to say that in these manor pleas we frequently find remarkable and unexpected illustrations of the fact. How much have the technical forms of action of trespass, debt, and covenant had to do with our modern law; and how important to know the process by which these tyrannous forms of action came into being and began their long career of dominion! The like is not to be found in contemporaneous history.

The pleas in the royal courts, and the side-light of chronicles and registers, help us much to an understanding of the matter; but often, at the point where these fail us, the pleas in the manor courts, in these very rolls, make us thankful that an editor has been found with courage to turn over the records and make them throw out their hidden light.

Your space will not permit me to go into details; but I hope you will allow me a word by way of illustration of what has been said. Whence came our action for defamation, with its troublesome allegation of malice? It has been usual as guess-work to say, from the

Court Christian, by way of the statute of Westminster Second, under which actions "on the case" arose. But in this volume of manor rolls we find many actions for defamation about the time of the statute, some, I think (I speak now from memory), before that time, with every indication that they are of old. Nor is there anything in them — and the pleadings are often given in full — that savors of the Court Christian; there is no mention of "malitia" in any of the half-dozen cases which I have had the pleasure of seeing in the proofs.

When it is added that the trial in all these cases has been by jury, and apparently by the jury of presentment of the manor, enough will have been said, I trust, to make a strong case for the present volume, and to make the members of the society (may their tribe increase!) anxious to see it. A single case in it has been worth my guinea.

MELVILLE M. BIGELOW.

CAMBRIDGE, March 4, 1889.

IN the case of *People* v. *O'Brien*, 18 N. E. Rep. 692, recently decided in New York, and digested in the last number of the REVIEW,[1] where a statute, after abrogating the charter of the Broadway Surface Railroad Company, bestowed its franchises gratuitously upon the city of New York, on the theory that corporate property, ceasing to exist as such at the dissolution of the corporation, may be taken by the State without technically infringing any right of those previously interested therein, the court thus emphatically express themselves: "The contention that securities representing a large part of the world's wealth are beyond the reach of the protection which the Constitution gives to property, and are subject to the arbitrary will of successive legislatures, to sanction or destroy at their pleasure or discretion, is a proposition so repugnant to reason and justice, as well as the traditions of the Anglo-Saxon race in respect to the security of rights of property, that there is little reason to suppose that it will ever receive the sanction of the judiciary; and we desire, in unqualified terms, to express our disapprobation of such a doctrine."

This statement is particularly gratifying to those who remember the extravagant notions about the power of the State, current at the time of the unearthing of the frauds by which the Broadway Company procured its grant from the New York aldermen.

THE statement recently made in an editorial of a well-known newspaper that the Supreme Court of the United States "is perhaps the most original creative piece of political construction known to history,"[2] is an extreme expression of the common opinion that our Supreme Court was almost entirely an original creation of the framers of the Constitution; in fact, a wholly unprecedented piece of judicial machinery that sprang, as it were, full panoplied from their brains, as did Minerva from the head of Jove.

This romantic idea that the entire Constitution was thus the spontaneous offspring of the brain of its framers, expressed in Gladstone's famous saying, that "the American Constitution is the most wonderful work ever struck off at a given time by the brain and purpose of man," has been gradually shrinking away under the light of historical investigation, until at present the still undispelled romance attached to the

[1] [p. 335].

[2] The Boston Post, Jan. 24, 1889.

creation of the Supreme Court is the greater part of the small remnant of what was once so great a whole. Modern historical research, however, which cares little for hero-worship or for romance, and which insists that political institutions, like living organisms, are as a rule developed from earlier institutions by a process of selecting and adopting those features which experience has proven to be best adapted to the needs of the political environment, is fast demonstrating that even the lingering bit of poetical statement as to the origin of the Supreme Court will scarcely bear the light of careful investigation.

It is true that De Tocqueville, who wrote in the days of hero-worship and historical romance, pronounced a dictum looking towards the theory of supernatural origin. So, also, Sir Henry Maine has more recently written, that the Supreme Court of the United States is "a virtually unique creation of the founders of the Constitution," an experiment with "no exact precedent for it, either in the ancient or modern world." But then he added, a few lines further, that, "novel as was the Federal Judicature established by the American Constitution as a whole, it nevertheless had its roots in the Past, and most of their beginnings must be sought in England."[1]

It seems, indeed, to be true that the case against the originality of our judicial system can be put even more strongly than it is put by Sir Henry Maine. In fact, it is somewhat strange that this idea of novelty should have spread so widely as it has done, in view of the statement made by Hamilton in the "Federalist" as to the plan of the convention for committing the judicial power in last resort to an independent court, which is the characteristic feature of our system, that, "contrary to the supposition of those who have represented the plan of the convention, in this respect, as novel and unprecedented, it is but a copy of the constitutions of New Hampshire, Massachusetts, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia."[2]

After many years, in which this view has been overlooked, the historical pendulum is again swinging back to its starting-point. Thus Mr. Alexander Johnston has recently declared that the erection of the judiciary into a position as a coördinate branch of the government, which he characterizes as the great achievement of the convention, and one of the most distinguished successes of the American system, "came in, not with the Convention, but with the adoption of written constitutions by the States." This result, inseparable from the adoption of a permanent exponent of the popular will as the supreme authority by whose provisions the courts must test the validity of legislative action, "had already been obtained in eleven of the thirteen States in 1787, through their adoption of written constitutions; and the Convention, by its coincident adoption of a written constitution, and of a system of courts, copied directly the results of State experience. Indeed, the germs of the whole system may be traced far back of 1776, into colonial experience."[3]

So, also, Mr. James Bryce, in his recent masterly work upon "The American Commonwealth," concludes that the relation of the Federal

[1] Maine's Popular Government, American edition, p. 218.
[2] The Federalist, No. 81, J. C. Hamilton's ed., 598. Quoted in 2 Story on the Constitution, 4th ed., p. 392.
[3] The First Century of the Constitution, The New Prince. Rev., vol. iv., p. 182. See also another quotation from same article in Bryce's Amer. Com., vol. i., p. 668.

courts to the Constitution, as established by the plan of the Convention of 1787, is "simple, useful, and conformable to general legal principles," and that although "it is, in the original sense of the word, an elegant plan," yet "it is not novel. It was at work in the States before the Convention of 1787 met. It was at work in the thirteen colonies before they revolted from England. It is an application of old and familiar doctrines. Such novelty as there is belongs to the scheme of a Supreme or Rigid Constitution, reserving the ultimate power to the people, and limiting in the same measure the power of the Legislature." [1]

In short, instead of claiming that the framers of the Constitution were creative theorists of wondrous power, we must give them the juster, and perhaps greater praise, of being endowed with that supreme and uncommon sense that enables men to wisely utilize the experience of the past in building for the future. We can fitly apply to their work in the creation of our judiciary system the praise given them by James Russell Lowell: "They had a profound disbelief in theory and new forms, and knew better than to commit the folly of breaking with the past. They were not seduced by the French fallacy that a new system of government could be ordered like a new suit of clothes. They would as soon have thought of ordering a new suit of flesh and skin. It is only on the roaring loom of time that the stuff is woven for such a vesture of their thought and experience as they were meditating." [2]

APROPOS of Judge Cooley's address upon the subject of Written Constitutions, published in this number of the REVIEW, is the fact that the 14th of last January was the two hundred and fiftieth anniversary of the adoption of the first constitution of what is now the State of Connecticut. This document, called "Fundamental Orders," adopted at Hartford in 1639, enjoys the honor, it is said, of being the first written constitution, in the modern sense of that phrase, known to the world. That is to say, it is said to be the first document adopted by the citizens of a political community, containing permanent limitations upon the powers of the government which it created.

The preamble to this interesting document recites that "we the Inhabitants and Residents of Windsor, Harteford, and Wethersfield . . . now cohabiting and dwelling in and upon the River of Conectcotte and the Lands thereunto adioyneing . . . doe . . . assotiate and coniogne ourselues to be as one Publike State or Comenwelth; and doe, for ourselues and our successors and such as shall be adioyned to vs att any tyme hereafter, enter into Combination and Confederation togather, to mayntayne and p^{r}searue the liberty and purity of the gospell of our Lord Jesus w^{ch} we now p^{r}fesse, as also the disciplyne of the Churches, w^{ch} according to the truth of the said gospell is now practiced amongst us; As also in o^{r} Ciuell Affaires to be guided and gouerned according to such Lawes, Rules, Orders and decrees as shall be made, ordered & decreed, as followeth." [3]

THE recent English case of *Cann* v. *Willson*, 39 Ch. D. 39, digested in the present number of the REVIEW, decides that a man who care-

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[1] Bryce's Amer. Com., vol. i., p. 250.

[2] Lowell, Democracy and other Addresses, p. 23, cited in Bryce's Amer. Com., vol. i., p. 31, note.

[3] Poore's Charters and Constitutions, 249. Also reprinted in series of "Old South Leaflets," together with the "Fundamental Agreement" of New Haven.

lessly and recklessly makes a statement, knowing that another person intends to act upon it, and under such circumstances that the other is reasonably entitled to rely upon it, although he himself is not interested in the result of the other's action, is, in the event that the statement proves untrue, liable in damages to the other who has been injured by acting upon it, both in an action on the case for negligence, and in an action of deceit for the misrepresentation.

Recovery on the ground of negligence is based upon an analogy to those cases in which liability is fixed upon one who carelessly erects a dangerous scaffolding which he knows others are to use, or mixes dangerous ingredients in a remedy offered for public sale. So in *Cann* v. *Willson*, the basis of the responsibility is said to be that the maker of the statement, knowing that another person intends to act upon it, being reasonably entitled so to do, has voluntarily assumed the duty of supplying a safe and accurate statement, and is liable for negligence in the performance of this duty. The analogy seems to be a good one. Sound public policy demands the fixing of the responsibility in question.

The phrase "under such circumstances that the other is reasonably entitled to rely on his statement," though not used by the court, seems to express their doctrine as accurately as it can be defined. In the case under discussion, the defendants, a firm of valuers, were employed by a third person, with whom the plaintiff was negotiating for the mortgage of certain property, to give the plaintiff a valuation of the property. Here the plaintiff evidently was reasonably entitled to rely on the carefulness of the defendant's valuation, although there was no contract relation between him and them, and although they were not interested in his action with regard to the property. There is no reason to believe that the court would have held the defendants liable had they been mere officious volunteers giving information on which the plaintiff would not have been reasonably entitled to rely. An able critic in the January "Law Quarterly"[1] is misled in this respect, his criticism of the case as to this point being based on the mistaken ground that the valuation was given *gratis*.

Upon the point that an action of deceit can, under these circumstances, be maintained, *Cann* v. *Willson* goes no farther than the previous decision of *Peek* v. *Derry*, 37 Ch. D. 541, digested 2 H. L. REV. 189, in which the doctrine had been already established that an untrue statement, recklessly made, without reasonable grounds for believing it to be true, is, in an action for deceit, equivalent to a statement made with the knowledge that it is false. The cumulative authority of this present decision seems to firmly establish in the English law that novel, though apparently beneficial, doctrine.

It had long before been settled that in an action for deceit it was not necessary to prove that the defendant had anything to gain by his misstatement, or that he was under any contractual relation to the plaintiff. *Polhill* v. *Walter*, 3 B. & Ad. 114.

Modern English law is moving fast in the direction of fixing additional responsibility upon the makers of statements which are to be acted upon in dealings between man and man; it is to be trusted that the American law may keep pace with this beneficial advance.

[1] Law Quarterly Review, vol. 5, p. 101. The "Law Quarterly" contains (pp. 101–103) two interesting criticisms of *Cann* v. *Willson* (one written by the editor), which differ in part both from each other and from the opinions expressed in this note.